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No. 80-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

TRANS INTERNATIONAL AIRLINES, INC.,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION; TEAMSTERS LOCAL 2707; MARVIN L. GRISWOLD; TEAMSTERS LOCAL 732; AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court lack jurisdiction under the Norris-LaGuardia Act to enforce specifically a military no-strike clause by enjoining a strike undertaken in the course of a major dispute after the mandatory procedures of the Railway Labor Act had been exhausted?

2. Do the major dispute procedures of the Railway Labor Act prohibit employees from sympathetically honoring picket lines established by another employee craft, where their sympathetic action is engaged in solely to support the bargaining position of the other craft, and there is no underlying dispute between the sympathizing employees and the common employer?

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Northern District of California (Pet. App. A),[1] enjoining the primary strike

[1] References to pages in the appendix to the petition are designated "Pet. App.," while references in the appendix to this opposition brief are designated "Resp. App."

against military flights, are not officially reported but can be found at 96 L.R.R.M. 2763. The district court's memorandum opinion and order (Pet. App. B), enjoining sympathetic action affecting military flights but otherwise declining preliminary injunctive relief, is reported at 439 F. Supp. 184 and can be found at 96 L.R.R.M. 2766. The modified opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. D) is unreported, as is the court's denial of rehearing (Pet. App. E); both are set forth in the appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.*, and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, are set forth in the petition, at 3, and in the appendix to this opposition brief (Resp. App., at A-1).

STATEMENT OF THE CASE

Trans International Airlines, Inc. (TIA), the petitioner, is the corporate survivor of a merger between TIA and Saturn Airways, Inc., which was effectuated on November 30, 1976. When this action was initiated on September 7, 1977, TIA's flight attendants and flight engineers were represented by the Teamsters, and the pilots on the post-merger carrier were represented by the Air Line Pilots Association (ALPA). Separate collective-bargaining agreements were in effect covering the former Saturn engineers and pilots. TIA's engineers and pilots

were covered by a pre-merger Crewmember Agreement,[2] while the TIA and Saturn flight attendants were covered, until September 8, 1977, by the pre-merger TIA Flight Attendant Agreement.

The major contract dispute out of which this litigation arose began with service of the Teamsters' § 6 Notice, dated January 9, 1976, advising TIA that the flight attendants intended to negotiate changes in their rates of pay, rules and working conditions. Conferences between the parties and efforts by the National Mediation Board to achieve settlement were unsuccessful. On August 8, 1977, concluding that mediation had failed, the Board released the parties to their self-help remedies. Efforts to reach settlement during the ensuing 30-day "cooling-off" period also failed. Therefore, a strike was called for September 8, 1977.

On the last day of the "cooling-off" period, September 7, TIA filed two actions for injunctive relief.[3] The first complaint sought an injunction against the primary strike by the flight attendants, alleging that the Teamsters had bargained in bad faith; that strike action was foreclosed under the Order of the Civil Aeronautics Board (CAB) approving the TIA-Saturn merger; and that a strike against military operations would violate the military no-strike clause in the expired Flight Attendant Agreement (Pet. App. F, at A-85). This clause

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[2] TIA's pilots were represented by the Teamsters until December, 1976, when they selected ALPA as their representative.

[3] Case No. C-77-2010 enjoining the flight attendants from striking military flights, an order the Teamsters appealed (No. 77-3362), and declining to enjoin the strike against commercial flights, an order the carrier cross-appealed (Nos. 77-3395, 77-3781). Case No. C-77-2011 enjoining the flight engineers and pilots with respect to military flights from which order the Teamsters (No. 77-3363) and ALPA (No. 78-1148) appealed, and refusing injunctive relief with respect to commercial flights from which order TIA cross-appealed (Nos. 77-3395, 77-3781, 78-1232).

appeared in the Agreement due to a policy of the Military Airlift Command (MAC) of encouraging its contractors to negotiate "no work stoppage" agreements covering military operations. The Department of the Air Force has since abandoned this policy; thus, MAC's standard Request for Proposals no longer requires or recommends "no work stoppage" agreements between air carrier contractors and their employees.

The second case was brought against the Teamsters and ALPA. Preliminary injunctive relief was requested to prevent TIA's flight engineers and pilots from honoring the flight attendants' picket lines pending arbitration of the question whether such sympathetic action was contractually permissible.[4] Alternatively, TIA contended that the flight engineers and pilots were disabled from respecting the flight attendants' picket lines by the status quo provisions of the RLA (§§ 2, First, 5 and 6).

Decisions Of The District Court

Upon TIA's motion, the district court temporarily restrained all strike activity (Pet. App., at A-2, -10). The following day, September 8, the court limited the prohibitions of its temporary restraining order against the flight attendants to their interference with military flights. The flight engineers were temporarily restrained from interfering with all military flights and TIA's cargo operations (Pet. App., at A-2, -10). The union secured its members' compliance with the temporary restraining orders. Contrary to the petition, at 4-5, no sanctioned strike activity occurred prior to September 10, when only TIA's commercial business was struck.

The preliminary injunction hearing was held on September 15, 1977. Thereafter, the district court declined

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[4] The contract clauses in issue are reprinted in the petition (Pet. App. F).

to enjoin the flight attendants from striking TIA's commercial operations, holding that the case was controlled by RLA principles rather than the CAB's Order, and that the Teamsters Union had not violated its bargaining obligations under § 2, First of the Act. A preliminary injunction was issued against any strike affecting military flights on the basis of a military no-strike clause in the pre-merger TIA flight attendant agreement. Similarly, injunctions to prevent the flight engineers and pilots from respecting the flight attendants' picket lines around commercial flights were denied, whereas sympathetic action affecting military flights was enjoined. Relying on *Buffalo Forge Co.* v. *USW*, 428 U.S. 397 (1976), the court held that the Norris-LaGuardia Act, 29 U.S.C. § 104, prohibits issuance of an injunction against sympathetic action, where the underlying issue (the primary strike) is not arbitrable.

Buffalo Forge is applicable in the RLA context, the court reasoned, because sympathetic action is associated with a related major dispute in which self-help is permissible. Disputes caused by respect for fellow employees' picket lines have elements in common with major disputes that clearly distinguish them from other types of minor disputes in which self-help pending arbitration is impermissible. In addition, the court noted that sympathetic action could be enjoined pending arbitration in every case, if carriers can obtain injunctive relief simply by claiming that such action raises an issue of contract interpretation, thus depriving employees of crucial support from their fellow workers.

These considerations did not prohibit a military injunction, in the court's opinion, because military no-strike clauses appeared in the pilots' and engineers' agreements. Also, due to the military injunction against the flight attendants, sympathetic action affecting military flights would generate an independent work stoppage in operations exempt from the primary dispute.

Developments Pending Appeal

Cross-motions for stay of the military strike injunctions, and for a temporary injunction against the commercial strike, were argued in the Ninth Circuit Court of Appeals on October 19, 1977. No decision was issued on these motions. The Teamsters were found in civil contempt of the military strike injunctions by the district court on November 1, 1977 (A. 23a), based on conduct the district court found to have begun on October 30, 1977, and were found later that week to have purged themselves of contempt (A. 27a). The strike ended in early January, 1978. On January 12, 1978, the parties executed a new collective-bargaining agreement that resolved all issues over which the strike began. TIA's flight attendants selected another union, the Association of Flight Attendants, to represent them on June 4, 1979. The court of appeals issued an order on July 5, 1979, directing the parties to show cause why the appeals should not be dismissed as moot (A. 29a).[5]

Decision Of The Court Of Appeals

On appeal, the Ninth Circuit panel held that the case was not mooted by the ending of the strike, the execution of a new collective-bargaining agreement, and loss of the Teamsters' certification to represent the flight attendants. It maintained that the parties had not settled the controversies which spawned this litigation because TIA's claim for compensatory fines for contempt of the preliminary injunction remained outstanding. Passing to the merits, the court of appeals upheld the district court's decision that the Teamsters had not breached their bargaining duty (an issue not presented by the petition), and held that the lower court had acted without jurisdiction in specifically enforcing the military no-strike clause.

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[5] The references in this paragraph are to the appendix to the petition filed in Case No. 80-478.

In the panel majority's considered opinion, the Norris-LaGuardia Act, 29 U.S.C. § 104, prohibited enforcement of the military no-strike clause by injunctive order. The clause had been opened for negotiation and mediation; thus, its threatened breach did not constitute a violation of the RLA's major dispute provisions because the Act's mandatory procedures had been exhausted (Pet. App., at A-48). The court of appeals also concluded that a threatened breach of the military no-strike clause would not give rise to a minor dispute referable to arbitration.[6] It reasoned that the threatened breach was "so clear that arbitration is not necessary to determine the violation . . ." (Pet. App., A-55). Since the court of appeals was not "persuaded that a substantial purpose unique to the RLA, or protection of its dispute settlement mechanisms, would be substantially furthered by specific enforcement of the clause," it declined to sustain the district court's military injunction against the flight attendants (Pet. App., at A-49 to -50).

On the other hand, the court of appeals held that the district court had jurisdiction to enjoin the flight engineers and pilots from honoring the flight attendants' picket lines around commercial and military flights until completion of the minor dispute mechanism established their right to engage in sympathetic action. It thought *Buffalo Forge's* reasoning inapplicable to the RLA, stating that considerations such as the avoidance of judicial intrusion into arbitrable disputes, the scope of permissible pre-arbitration remedies, and the effect of its decision on the settlement of disputes by arbitration, are not present

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[6] In this regard, the Flight Attendant Agreement with its arbitration provisions had expired; moreover, the dispute over military flying arose after the Act's major dispute provisions had run their course. Consequently, the dispute occurred after the duty to arbitrate under the Flight Attendant Agreement had ended. This fact was recognized by the court of appeals (Pet. App., at A-48 to -49).

here. Not only is arbitration a substitute for sympathetic action, in the court's view, but maintenance of the status quo is appropriate to prevent a subsequent award from being meaningless where it is "clear" that sympathetic action violates a no-strike pledge. The appellate court declined, as had the district court, to consider TIA's alternative "argument that regardless of any contract provisions, all sympathy strikes may be enjoined as violating policies expressed in the RLA" (Pet. App., at A-82).

The case was remanded to the district court for consideration of the contempt issue in light of the language of the no-strike clauses. Rehearing was denied, with the following statement by Judge Goodwin:

> "I would modify the majority opinion to hold that a sympathy strike is a major dispute if the work stoppage with which the sympathy strike is allied is a major dispute. I do not read the Railway Labor Act cases as extending to major disputes the power to enjoin." [Pet. App., at A-84.]

REASONS FOR DENYING THE WRIT [7]

I. THE DECISION OF THE COURT BELOW, DENYING SPECIFIC ENFORCEMENT TO THE MILITARY NO-STRIKE CLAUSE, FOLLOWS THIS COURT'S WELL-ESTABLISHED PRECEDENTS, CONFORMS TO THE DECISIONS OF OTHER CIRCUIT COURTS, AND DEALS WITH AN ISSUE LIKELY TO BE OF HISTORICAL INTEREST ONLY.

A. In declining to permit specific enforcement of the military no-strike clause after exhaustion of the RLA's major dispute procedures, the court below adhered to this Court's decisions. Thus, it has long been recognized that "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolving a major dispute [may] employ the full range of whatever peaceful economic power they can muster. . . ." *BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969). See also *Railway Clerks* v. *Florida E. Coast Ry.*, 384 U.S. 238, 244 (1966); *BLE* v. *Baltimore & O. R.R.*, 372 U.S. 284 (1963). Under the statutory scheme, "compulsions go only to insure that the [Act's] procedures are exhausted before resort can be had to self-help. . . ." *BRT* v. *Jacksonville Terminal Co., supra*, 394 U.S. at 380; *Elgin J. & E. R.R.* v. *Burley*, 325 U.S. 711, 725 (1945).

There is no provision in the RLA, comparable to § 301 of the LMRA, 29 U.S.C. § 185, that gives an employer any right of action against a union for breach of an

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[7] As noted in our petition in No. 80-478, at 6-9, this case is moot under the standards enunciated by this Court in *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911). Accordingly, consideration of the questions presented by TIA's petition in No. 80-480 is foreclosed. It would be appropriate, however, to grant the writ for the purpose of vacating the Ninth Circuit Court of Appeals' judgment and remanding the cause for dismissal because of mootness. See *United States* v. *Munsingwear*, 340 U.S. 36, 41 (1950).

employment contract. *Eastern Air Lines, Inc.* v. *FEIA*, 340 F.2d 104, 106-07 (5th Cir.), *cert. denied*, 382 U.S. 811 (1965). The RLA's major dispute provisions are not concerned with the enforcement of agreements, but with assuring that rates of pay, rules and working conditions are not changed until the Act's machinery (i.e., conference, negotiation and mediation) has been afforded full opportunity to induce voluntary settlement. There is simply no basis in the RLA for implying a cause of action for court enforcement of a no-strike clause.[8] As this Court has indicated, decisional law "negate[s] the 'implication' of an independent federal remedy against self-help. . . ." *BRT* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 380.

Moreover, the Norris-LaGuardia Act, 29 U.S.C. § 104, insulates unions from injunctions specifically enforcing contract terms. *Pan American World Airways* v. *FEIA*, 306 F.2d 840, 846-47 (2d Cir. 1962); *W. L. Mead, Inc.* v. *IBT*, 217 F.2d 6, 8-10 (1st Cir. 1954), *cert. dismissed*, 352 U.S. 802 (1956). Norris-LaGuardia's jurisdictional limitations, expressing a basic policy against the injunction of activities of labor unions, are fully applicable to cases arising under the RLA. *Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 342 (1960).

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[8] Cf. *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 337 (1943), where this Court said:

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread."

This Court has repeatedly rejected the notion that no-strike clauses can be specifically enforced by injunctive orders issued by the federal courts. Where, as here, the violation claimed is breach of a private contract, and no additional public policy is threatened, the anti-injunction policy of Norris-LaGuardia prevails. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 225 (1962) (Brennan, J., dissenting). See also *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235, 249 (1970). Aside from the enforcement of agreements to arbitrate and arbitral awards, this "Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. . . ." *Buffalo Forge Co.* v. *USW*, *supra*, 428 U.S. at 409.

The court below correctly determined that breach of the military no-strike clause threatened no public policy inherent in the RLA's dispute settlement procedures, stating:

> "[A]fter major dispute procedures are completely exhausted, with reasonable efforts having been made to reach an agreement, see *Chicago & N.W. Ry.* [v. *UTU*, 402 U.S. 570 (1971)], the policies peculiar to the RLA are also exhausted, and the parties are governed by general labor law principles. The Norris-LaGuardia Act was passed to limit our role in enforcing labor contracts, in part because of mistakes of the past and in part, perhaps, for fear that personal bias sometimes difficult to detect even in ourselves will weigh too heavily in the enforcement process. See, e.g., [*BRT* v.] *Chicago River* [*& I. R.R.*, 353 U.S. 30,] at 40-41, 77 S.Ct. [635,] at 640-641 [(1957)]; *F. Frankfurter & N. Greene*, [*The Labor Injunction* (1930).] Congress has mandated the courts not to alter through injunctions the economic balance between employers and unions without a weighty statutory reason for doing so. The RLA plan for avoiding disruption is not threatened by the

> flight attendants' strike. . . ." [Pet. App., at A-53 (footnote omitted).]

Accordingly, it held that Norris-LaGuardia's anti-injunction policy prevailed and barred specific enforcement of the military no-strike clause.

TIA urges here, as it argued below, that § 2, First of the RLA,[9] constitutes a contract enforcement device, independent of the Act's status quo provisions applicable to major disputes, that allows the federal courts to enjoin actual and threatened contract breaches. But this view is inconsistent with *Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142 (1969). There this Court, referring to the legislative history of the 1926 Act, noted the relationship between § 2, First and the status quo (45 U.S.C. §§ 155, 156 & 160) provisions of the Act. "These provisions must be read in conjunction with the implicit status quo requirement in the obligation imposed upon parties by § 2, First. . . ." *Id.* at 151. This Court then stated explicitly:

> "While the . . . language of §§ 5, 6, and 10 is not identical in each case, *we believe that these provisions, together with § 2, First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period.* . . . The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objec-

[9] 45 U.S.C. § 152, First states as follows:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

> tive working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." [*Id.* at 152-53. (Emphasis added and footnote omitted.)]

Chicago & N.W. Ry. v. *UTU*, *supra*, 402 U.S. 570, is fully consistent with this perception of the statutory scheme. In that case, the Court held that Section 2, First's duty to exert every reasonable effort to make agreements and settle disputes, akin to the duty to bargain in good faith under the National Labor Relations Act, 29 U.S.C. § 158(a)(5), (b)(3), (d), was a legal obligation enforceable by the judiciary. The Court's rationale was both simple and compelling: "The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with 'a desire not to reach an agreement.' . . . [A]t least to this extent the duty to exert every reasonable effort is of the essence." 402 U.S. at 578-79 (citations and footnote omitted). Therefore, as the court below noted (Pet. App., at A-54), injunctive relief was authorized in *Chicago & N.W.* because bad-faith bargaining threatens the integrity of the RLA's mandatory major dispute mechanism. This rationale is inapplicable here.

In short, there is nothing in *Chicago & N.W.*, or in similar cases dealing with "surface bargaining,"[10] to suggest that § 2, First authorizes the federal courts to remedy simple contract breaches by issuing injunctions contrary to the Norris-LaGuardia Act.[11] Equally unavail-

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[10] E.g., *Piedmont Aviation, Inc.* v. *ALPA*, 416 F.2d 633 (4th Cir. 1969), *cert. denied*, 397 U.S. 926 (1970).

[11] TIA's argument necessarily assumes that the federal courts have concurrent jurisdiction with the adjustment boards to remedy arguable contract violations giving rise to minor disputes. But the nature of the statutory scheme, and decisions interpreting it, foreclose this unprecedented interpretation of § 2, First. Congress made

ing is TIA's attempt to analogize voluntary interest arbitration under § 7 of the RLA to the instant case (Petition, at 9-10). The application of § 2, First to voluntary interest arbitration is not at all apparent. Section 8 of the Act independently prohibits unilateral revocation of a voluntary agreement to arbitrate contract terms once the arbitration agreement has been properly signed and acknowledged. 45 U.S.C. § 158(n). Court enforcement of the final award is provided for in § 9 of the Act. 45 U.S.C. § 159, Second. Certainly Congress would not have enacted specific enforcement machinery for interest arbitration, if § 2, First had the effect contended for by TIA.

B. TIA's claim that a conflict of decision exists among the courts of appeal is mistaken. No circuit court has held, or even intimated, that collective-bargaining agreements can be enforced by injunctive order.[12] *Seaboard World Airlines, Inc.* v. *TWU*, 425 F.2d 1086 (1970), *adhered to on further consideration*, 443 F.2d 437 (2d Cir. 1971) dealt with an entirely different issue—whether a strike designed to force bargaining over a subject the parties have withdrawn from the scope of § 6 by an agreement not to reopen can be enjoined—and involves no conflict with the lower court's decision in the instant case.

In *Seaboard*, the parties had entered into an agreement in 1964 that purported to represent a "permanent solu-

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the jurisdiction of the adjustment boards over alleged contract violations exclusive, and narrowly circumscribed the courts' role in the resolution of such contract disputes. E.g., *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89 (1978), *rehearing denied*, 439 U.S. 1135 (1979).

[12] E.g., *Eastern Air Lines, Inc.* v. *FEIA*, *supra*, 340 F.2d at 106-07; *W. L. Mead, Inc.* v. *IBT*, *supra*, 217 F.2d at 8-10; cf. *Pan American World Airways* v. *FEIA*, *supra*, 306 F.2d at 846-47 (rejecting "accommodation" of Norris-LaGuardia's anti-injunction mandate after exhaustion of the RLA's major dispute procedures).

tion" of their dispute over a job security issue involving flight navigators displaced by technological change. The agreement, by its terms, could be reopened in 1974, but only as to wages. In 1969, the union attempted to reopen; however, the carrier refused to negotiate and sought injunctive relief against a threatened strike. The Act's major dispute provisions were not exhausted. Indeed, the dispute between the parties was whether the carrier was obligated to bargain over issues the parties had agreed would not be reopened. The court of appeals upheld injunctive relief against the strike until the district court could rule on the union's contention that the 1964 contract bar against reopening was illegal. On the second appeal, the court held that parties may "bind themselves against reopening for a period reasonable under the particular circumstances at issue." 443 F.2d at 439. The union was enjoined from forcing reopening by economic action.

A strike designed to expand the subjects over which a carrier is obligated to bargain, like any failure to bargain in good faith,[13] threatens the integrity of the RLA's dispute settlement procedures. To say that an injunction is warranted in such circumstances, however, is much different than saying the courts may freely enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. *Seaboard* does not stand for the latter proposition; consequently, "its reasoning does not support TIA's view of section 152" (Pet. App., at A-55).

Obviously, the instant case does not involve the bargainability of the Teamsters' § 6 Notice. There was no prescription, by contract or otherwise, against opening

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[13] See generally *Japan Air Lines Co.* v. *IAM*, 538 F.2d 46, 52-53 (2d Cir. 1976) (strike over a non-mandatory bargaining subject violates § 2, First); *Pullman Co.* v. *Order of Ry. Conductors*, 316 F.2d 556 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963) (strike over issue allegedly beyond the scope of the union's § 6 Notice; on appeal, § 6 Notice held adequate).

the military no-strike clause for proposed changes in accordance with § 6 of the Act. Nor did TIA ever claim that the union's proposal to amend or delete the clause was not a bargainable subject. It simply declined to eliminate or change the military no-strike clause when the matter was covered in mediation sessions. Having exhausted the Act's procedures in an unsuccessful, good-faith effort to reach agreement over changes in wages and working conditions, including changes in the military no-strike provision, the union's resort to self-help to compel the changes it had proposed offended no statutory policy governing the resolution of disputes. In this respect, *Seaboard* is readily distinguishable.

C. Finally, it should be noted that the enforceability of military "no work stoppage" agreements is unlikely to constitute a significant issue in the future. The Department of the Air Force has terminated its policy of requiring or encouraging participants in the MAC program to obtain such agreements from their employees as a condition of qualifying for additional expansion business (i.e., business in excess of the fixed number of flights per month to which each MAC carrier is committed). The district court was troubled by the fact that "the administration of MAC expansion business will almost inevitably tend to strengthen the economic position of a struck airline, such as TIA, as against its striking employees" (Pet. App., at A-20). But it thought the matter was one for Executive branch resolution. Now that this resolution has occurred, it is doubtful that the courts will often be called upon to face the issue.

II. THE RLA'S MAJOR DISPUTE PROVISIONS DO NOT BAR EMPLOYEES FROM ENGAGING IN SYMPATHETIC ACTION, AND THE PETITION PRESENTS NO SUBSTANTIAL REASON WHY THIS QUESTION, WHICH WAS NOT RULED ON BELOW, SHOULD NOW BE DECIDED.

The court below held that the district court had jurisdiction to enjoin TIA's pilots and flight engineers from respecting picket lines established by its flight attendants, pending arbitration of the issue whether sympathetic action is permissible under the various no-strike clauses. The court of appeals' decision raises an important question of federal law regarding the jurisdictional limitations against the issuance of injunctions in labor disputes. This question is presented to the Court by the petitions filed in Nos. 80-470 and 80-478. The unions' petitions urge, as a reason for review, the conflict between the lower court's holding and this Court's decision in *Buffalo Forge Co.* v. *USW*, *supra*, 428 U.S. 397.

As indicated by the fourth question presented by TIA's petition, the carrier also believes that the impact of *Buffalo Forge* in the circumstances of this case constitutes an important question deserving review. Yet the ultimate question for which TIA seeks review bears no relationship to the holding of the court of appeals. In fact, neither of the courts below saw fit to pass on TIA's alternative argument that sympathetic action is foreclosed by the major dispute provisions of the RLA (Pet. App., at A-82). At the outset, we suggest that there are no exceptional circumstances involved here to justify resolution of an issue not passed on below. See *Singleton* v. *Wulff*, 428 U.S. 106, 120-21 (1976); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

The paucity of decisions dealing with the issue TIA asks this Court to decide attests to its relative unimportance, particularly since sympathetic action occurs fre-

quently in rail and airline disputes.[14] Certainly the claim that nondisputing employees, who themselves have not exhausted the major dispute provisions of the Act, cannot decline to cross the picket lines of those who have, has not been seriously made since this Court decided *BRT* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. 369. There the Court, in the context of a claimed secondary boycott illegal under state law, concluded that "[p]eaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act." *Id.* at 386. It also noted that, even "[r]ead narrowly," earlier decisions "negate[d] the 'implication' of an independent federal remedy against self-help. . . ." *Id.* at 380.

Equally important, the analytical flaws in TIA's suggestion that the RLA's major dispute provisions bar sympathetic action are so glaring that the question presented for review can be fairly described as *insubstantial.* Nowhere does the RLA prohibit strikes during the term of an agreement. Instead, the Act prohibits carriers from changing established rates of pay, rules or working conditions, and unions from resorting to self-help to compel such changes, until the Act's major dispute provisions are exhausted. 45 U.S.C. §§ 155, 156 & 160; *Detroit & Toledo Shore Line R.R.* v. *UTU*, *supra*, 396 U.S. at 152-53. Therefore, the Act's major dispute mechanism is not triggered by a strike alone, but by a dispute over changes in agreements and objective working conditions. Unless the strike is related to an unprocessed major dispute, no injunction may issue under the Act's status quo provisions. *Eastern Air Lines, Inc.* v. *FEIA*, *supra*,

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[14] E.g., *BRT* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966); *BLFE* v. *Florida E. Coast Ry.*, 346 F.2d 673 (5th Cir. 1965); *Chicago & Ill. Midland Ry.* v. *BRT*, 315 F.2d 771 (7th Cir.), *vacated as moot*, 375 U.S. 18 (1963).

340 F.2d at 106; *Pan American World Airways* v. *FEIA*, *supra*, 306 F.2d at 846-48.

In the instant case, there was no underlying dispute between TIA and its engineers or pilots. The crewmembers honored the flight attendants' picket lines solely to support the attendants' bargaining position. No credible claim can be made that sympathetic action by the engineers and pilots was somehow related to a change in the crewmembers' agreements or working conditions. Indeed, the petition suggests no basis for such a claim (Petition, at 20-21); it states only that the crewmembers' sympathetic action violated their agreements' general no-strike clauses. But as TIA argued, the unions acknowledged, and both lower courts found, this claim generated a minor dispute between TIA and the crewmembers. The major dispute involved here (between the flight attendants and the carrier) was fully processed through the Act's mandatory procedures. Thus, the crewmembers' sympathetic action plainly did not violate the Act's status quo requirement.[15]

TIA's notion that the Act generally prohibits strikes, unless contractually permitted (Petition, at 21-22), is contrary to this Court's conclusion that "[t]he right to strike finds support, not only in analogy to the NLRA, but in the history of, and decisions under, the Railway Labor Act itself." *BRT* v. *Jacksonville Terminal Co.*, *supra*, 394 U.S. at 390 n.24. See also *Coca Cola Bottling*

[15] In Appendix E of Respondents' Brief to the Ninth Circuit Court of Appeals, we canvassed the National Mediation Board's most up-to-date strike statistics which then covered the period 1954-1975. There is no record of the small groups mentioned by TIA (Petition, at 15) having struck at all. Of the 177 strikes in the rail and air industries during the 21-year period, only 24 were by groups of less than 40 employees, and 50% of the latter strikes lasted less than 10 days. In short, the spectre of transportation disruption raised by TIA is refuted by actual experience in the industries involved.

Co. v. *Teamsters Local 326*, 104 L.R.R.M. 2776 (3d Cir. 1980); *NLRB* v. *C.K. Smith & Co.*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978); and *Gary Hobart Water Corp.* v. *NLRB*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975), in which the courts of appeal declined to assume that sympathetic action was prohibited by broad, general no-strike language in the absence of evidence showing a "clear and unmistakable waiver" of the right to honor primary picket lines.

The considerations discussed above indicate conclusively that the issue presented for review by TIA's petition is insubstantial and does not warrant this Court's attention. Also, we see no reason why the important federal question raised by the decision below, and presented for review in No. 80-478, should be obscured by further consideration of the tangential issue TIA asks this Court to decide.

CONCLUSION

For the foregoing reasons, the petition in No. 80-480 for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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STATUTES INVOLVED

The portions of the Railway Labor Act, as amended, involved in this case are Section 2, First, 45 U.S.C. § 152; Section 2, Fourth, 45 U.S.C. § 152, Fourth; Section 2, Seventh, 45 U.S.C. § 152, Seventh; Section 5, First, 45 U.S.C. § 155, First; Section 6, 45 U.S.C. § 156; Section 7, 45 U.S.C. § 157; Section 8(n), 45 U.S.C. § 158(n); and Section 9, Second, 45 U.S.C. § 159, Second.

Section 2, First of the Act states:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2, Fourth states:

> Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees. . . .

Section 2, Seventh states:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Section 5, First states:

> First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.
>
> If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at

once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Section 6 states:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Section 7 states:

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in

the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to

agree upon any or upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommitte.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to

be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The

compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contacts, agreements, and documents as may be deemed by the Board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

Section 8(n) states in part:

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate

may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, delivered to such board of arbitration.

Section 9, Second states:

An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

The portion of the Norris-LaGuardia Act involved in this case is Section 104, 29 U.S.C. § 104.

Section 104 states:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization,

regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

The portions of the National Labor Relations Act, as amended, analagously involved in this case are Section 8(a)(5), 29 U.S.C. § 158(a)(5); Section 8(b)(3), 29 U.S.C. § 158(b)(3); and Section 8(d), 29 U.S.C. § 158(d).

Section 8(a)(5) states:

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(b)(3) states:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

Section 8(d) states:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days

prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his

status as an employee of the employer engaged in the particular labor dispute, for the purpose of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

The portions of the Labor-Management Relations Act, as amended, analagously involved in this case are Section 301, 29 U.S.C. § 185.

Section 301 states:

(a) Suits for violation of contracts between an employer and a labor organization representing employes in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization main-

tains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

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